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NO. 89-1016

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

RAFAEL HERNANDEZ COLON, ETC., ET AL

Petitioners

CARLOS MORALES FELICIANO, ET ALS

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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34 pp

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE.	1
SUMMARY OF ARGUMENT.	11
ARGUMENT	11
PETITIONERS CANNOT NOW COLLATERALLY ATTACK THE UNDERLYING ORDERS REQUIRING 35 SQUARE FEET OF SPACE PER INMATE	11
NO CONFLICT EXISTS WITH DECISIONS OF THIS COURT OR AMONG THE CIRCUITS.	20
THE SANCTIONS IMPOSED ON PETITIONERS ARE WITHIN THE DISTRICT COURT'S DISCRETIONARY AUTHORITY	22
THE COURT IS WITHOUT JURISDICTION TO GRANT A WRIT OF CERTIORARI BECAUSE THE PETITION WAS NOT TIMELY FILED	24
CONCLUSION	28

TABLE OF AUTHORITIES

CASES

Badgley v. Varelas, 729 F.2d 894, 899 (2nd Cir. 1984)	17
Bell v. Wolfish, 441 U.S. 520 (1979)	15, 20
Branti v. Finkel, 445 U.S. 507, 512 n.6	21
Cabrera v. Municipality of Bayamón, 622 F.2d 4, 7 (1st Cir. 1987)	16
Citizens' Bank of Michigan City v. Opperman, 249 U.S. 448 at 451, 63 L.Ed. 701 at 702 (1919) . .	25
Deal v. Cincinati Board of Education, 402 U.S. 962, 29 L.Ed. 2d 128 (1971).	25
Department of Banking v. Pink, 317 U.S. 264 at 268, 87 L.Ed. 254 at 257 (1942) . .	25

PAGE

Ewing v. Maples,
58 U.S.L.W. 3426 (Jan. 8, 1990) 27

Fazzini v. Gluch,
58 U.S.L.W. 3426 (Jan. 8, 1990) 27

Feliciano v. Barceló,
497 F.Supp. 14 (D.P.R. 1980). 1, 14

Filling v. Cunningham,
58 U.S.L.W. 3467 (Jan. 22, 1990). 27

Firey v. Washington,
58 U.S.L.W. 3320 (Nov. 13, 1989). 27

Fleming v. District Court for the County of El Paso, Colorado, 58 U.S.L.W. 34 26 (Jan. 8, 1990). 27

Gompers v. Bocks Stove & R. Co.,
221 U.S. 418, 449 (1910). 22

Hallstrom v. Tillamook County,
493 U.S. , 107 L.Ed. 2d 237 (1989) 26

Humphrey v. Bates,
58 U.S.L.W. 3384, 107 L.Ed. 2d 552 (Dec. 11, 1989). 27

Inmates of Suffolk County Jail v. Kearny,
573 F.2d 98 (1st Cir. 1978) 15

Local 28 of the Sheet Metal Workers' International Association v. E.E.O.C.
478 U.S. 421 (1986) 16

Maggio v. Zeitz,
333 U.S. 56, 69 (1948). 16

Martínez Rodríguez v. Jimenez,
409 F.Supp. 582, 595 (D.P.R. 1976). 13

Matton Steamboat Co. v. Murphy,
319 U.S. 412 at 415, 87 L.Ed. 1483 (1943) 25

Miller v. Farmers Alliance Mutual Insurance Company,
58 U.S.L.W. 3288 (Oct. 30, 1989). 27

Mitchelson v. Kemmerer Coal Company,
58 U.S.L.W. 3467 (Jan. 22, 1990). 27

Mohasco Corp. v. Silver,
447 U.S. 807, 826 (1980). 27

PAGE

Morales Feliciano v. Hernández Colón,
697 F.Supp. 26 (D.P.R. 1987) 7, 9, 14

Morales Feliciano v. Parole Bd. of Com. of P.R.,
887 F.Ed 1, 3 (1st Cir. 1989) 10, 20, 25

Morales Feliciano v. Romero Barceló,
672 F.Supp. 591 (D.P.R. 1986) 4

National Railroad Passenger Corp. v. Transporation Communication Union, 58 U.S.L.W. 3239
(Oct. 10, 1989) 27

Northbrook National Insurance Company v. Brewer,
493 U.S. 107 L.Ed. 2d 223 (1989) 26

Palmigiano v. DiPrete,
700 F.Supp. 1180, 1194-95 (D.R.I. 1988) 18

Pavelic & Leflore v. Marvel Entertainment Group,
58 U.S.L.W. 4038 (1989) 26

Perfect Fit Industry v. Acme Quilting Co.,
673 F.2d 53 (2nd Cir. 1982) 23

Posey v. Department of the Air Force,
58 U.S.L.W. 3212 (Oct. 2, 1989) 27

Ramachandran v. Secretary of the Navy,
58 U.S.L.W. 3304 (Oct. 30, 1989) 27

Rhodes v. Chapman,
452 U.S. 337 (1981) 15, 20

Ruiq v. McCotter,
661 F.Supp. 112, 116 (S.D. Tex. 1986) 18

Shillitani v. United States,
384 U.S. 364, 370 (1966) 22

Slater v. Goldberg,
58 U.S.L.W. 3426 (Jan. 8, 1990) 27

Stocks v. U.S.,
58 U.S.L.W. 3304 (Oct. 30, 1989) 27

Teague v. Commissioner of Customs,
394 U.S. 977, 22 L.Ed. 2d 756, reh. den.
395 U.S. 930, 23 L.Ed. 2d 251 (1969) 25

PAGE

Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 299 (1985) 21

Twelve John Does v. District of Columbia, 855 F.2d 874 (D.C. Cir. 1988) 17

United States v. Mississippi Tax Commission, 412 U.S. 363 at 368 n.10 (1973) 11

United States v. Rylander, 460 U.S. 752, 756-57 (1983) 16

Walker v. City of Birmingham, 388 U.S. 307 (1967) 16

Yang v. McCarthy, 58 U.S.L.W. 3212 (Oct. 2, 1989) 27

Young v. U.S. Ex Rel Vuitton Et Fils S.A., 481 U.S. 787 (1987) 22

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Eighth Amendment . . . . . Passim

FEDERAL STATUTES

28 U.S.C. 672 (c)(8). 27

28 U.S.C. 2101 (c). 25

40 U.S.C. 13 n.(a). 27

FEDERAL RULES

Rule 60(b)(5), Fed. R. C. Proc. 9

Rule 60(b)(6), Fed. R. C. Proc. 9

RULES OF THE SUPREME COURT

Former Rules

Rule 20.2 25

Rule 20.4 25

Rule 28.2 25

PAGE

Rule 29.1 25

Present Rules

Rule 13.1 25

Rule 29.2 25

Rule 30.1 25

TEXTS

Stern, Gressman & Shapiro, Supreme Court Practice, Sixth Edition, Washington, D.C.: BNA, Inc., 1986

STATEMENT OF THE CASE

This case, commenced 11 years ago, seeks system-wide relief from unconstitutional conditions of confinement. After seventeen days of trial, on September 5, 1980, the District Court issued a preliminary injunction and found that in all jails in Puerto Rico, inmates had been living in subhuman conditions for years, Feliciano v. Barceló, 497 F.Supp. 14 (D.P.R. 1980).[1]

Central to the multiple evils found by the district court was the unconscionable overcrowding whose density approximated 20 square feet of living and sleeping space per inmate, as compared to the 70-square-foot standard of the American Correctional Institute, or the 55-square-foot standard of the National Sheriffs' Association Handbook on jail architecture, or the 55-square-foot standard setup by the United States Army in 1969. Based on these findings, and on other findings related to lack of adequate sanitation, ventilation, fire safety, prisoner mobility, recreation and pervasive idleness, the district court in its order concluded that confinement under these conditions constituted cruel and unusual punishment prohibited by the United States Constitution.[2]

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[1]The date is incorrectly reported in the Federal Supplement as 1979.

[2]Other relief ordered included: the immediate closing down of the "calabozos" or dungeons; the transfer of mentally unfit inmates from the "calabozos" to psychiatric hospitals; the examination, by qualified psychiatrists, of all prisoners labeled as mentally unfit; the providing of proper mental health treatment and medical care for those in need of such treatment; the prohibition against placing mentally ill prisoners in isolation without surveillance; the appointment of a full-time Medical Director; instituting unified plans and procedures for the maintenance of medical records; the employment of professionals such as doctors, nurses, paramedics, psychiatrists, psychologists and others that may be necessary to provide adequate medical care and attention to the

To alleviate that overcrowding, the court ordered the then Administrator of Correction to provide no less than 35 square feet of living and sleeping space within six months and to provide plans for the provision of 70 square feet of cell space and 55 square feet in dormitories. No part of this decision was appealed.

For four years the Administrator and her three successors in office during the incumbency of Governor Carlos Romero Barcelo's Administration wrestled with the problem of overcrowding[3], but apart from the filing of so called "compliance reports" little was done to alleviate the conditions.[4] Indeed in some institutions overcrowding became worse. Respondents moved for relief requesting

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entire penal population; establishing procedures for the medical screening of each incoming pre-trial detainee or prisoner including a complete physical examination and testing for communicable diseases; the employment of a psychiatrist in charge of psychiatric care for emotionally and mentally disturbed inmates; the establishment of procedures for the psychiatric screening of all incoming inmates; providing each incoming inmate with soap, towels, toothpaste and toothbrush; requiring that food handlers have a physical examination and be tested for tuberculosis; and requiring that no inmate be denied any medication or special diet prescribed to him or her by a qualified physician.

3The Romero Barceló administration also started construction of a 600 new high-security prison. On winning the 1984 general elections, petitioner Rafael Hernández Colón kept a campaign promise to objecting neighbors and turned the new prison into a hospital.

4A total of eighteen "Compliance Reports" (Docket Nos. 627, 628, 629, 651, 667, 688, 707, 733, 751, 760, 763, 773, 774, 779, 785, 793) were filed by the Administration of Corrections from May 1, 1981, until March 30, 1984, allegedly informing the Court on the state of compliance. All of these reports were answered and opposed by the respondents.

that prisoners be released from custody. (Docket Nos. 716, 741, 783, 788).

In 1984 respondents moved for emergency relief, triggered by complaints from the hundreds of prisoners incarcerated at the Guayama Regional Detention Center about lack of water, beatings and brutal treatment by guards, lack of recreation, and overcrowding (Docket Nos. 795 et seq). A show cause order was issued and hearings were held in court and on-site at eight major closed penal institutions. The Administration of Correction prepared a profile of the inmate population in contemplation of an early release program to reduce overcrowding. (Docket No. 813).

The general elections of 1984 brought a new political party to power. The new administration filed no compliance reports as required by the 1980 orders, and a show cause hearing was held in late September 1985. It became apparent during that hearing and subsequent joint court-and-counsel visits to prisons in October 1985 that little if any improvement in security, sanitary and health conditions had been made, and that in some institutions, such as the State Penitentiary, the overcrowding had become worse. After that hearing and the on-site inspections, the class moved for the appointment of a monitor and for a declaration that the prisons in Puerto Rico were being operated in contravention of Constitutional mandates.

In opposing the request that a monitor be appointed, the petitioners--through counsel in open court--proclaimed their

willingness to accept and abide by the district court's orders. Counsel for petitioners argued that there was no need for a master as the only thing needed was for the court "... to issue and Order formulating specific orders in relation to specific problems with time limits to be executed by the government." Said he: "In other words, you tell the government, 'Look, we order you to this... this... and this..., and we order you to do it in three months or in two months" (Transcript of Proceedings, September 30, 1985).

The trial court then issued its second major reported decision in this case on March 21, 1986, Morales Feliciano v. Romero Barceló, 672 F.Supp. 591 (D.P.R. 1986). The district court found overcrowding to be the primary problem of the many other constitutional violations inflicted on the plaintiff class, and it explained this finding:

> Overcrowding is at the center of the many ills which make the conditions of imprisonment in the Commonwealth's penal institutions constitutionally unacceptable. Neither statistics nor anecdote will suffice to express the intensity of confinement, physical and psychological, to which the plaintiff class is condemned. Medical and social services cannot be rationally planned or systematically delivered in institutions filled beyond capacity to such an extent that at times inmates will cover the entire floor space in their living quarters when they lie down to sleep on the floors--with or without mattresses--and in double bunks ranged so closely together that they must be entered from the front rather than the side. Recreation, exercise and education, even where the facilities exist to provide them, are available only to a small fraction of the population. But all of these services and necessities are luxuries to these plaintiffs whose property and lives cannot be protected by the Administration.
>
> The overcrowding evidenced by the testimony of the superintendents, the films and photographs are hard to

> believe even when experienced. As the Court visited each institution the sense of physical closeness and the revulsion at so much compressed humanity grew to an awareness of the psychological stress which must affect any human being almost totally deprived of any privacy or intimacy. Towels and sheets have turned bunks into cubicles of isolation in spite of the Administration's prohibition of these make-shift partitions which increase security problems by reducing custodial visibility within the dormitories. Some few inmates, by the use of unapparent authority and power, have appropriated disproportionate amounts of space; in the newer institutions spaces meant to be linen and utilities closets have become the privileged domain of one or two inmates. Otherwise, the inmate population lives in oppressive physical propinquity in communal housing units in the tropical heat, with inadequate ventilation and not infrequently unprotected against the rain.

672 F.Supp. at 597. The district court, however, recognized that:

> The overcrowding which pervades the system cannot be corrected by a uniform assignment of square feet per inmate. Nor can we rely on the standards proffered by expert opinions and professional associations. The life in these institutions is in such a state of disarray and the incapacity of the Administration to manage the system is so evident, that we can only take square footage and recommended standards as our point of departure. As improvement is shown in other areas of penal life we will have to reconsider and modify our decision of today.

Id. at 603.

There was no appeal from that order, and, on the same day that this second major opinion was rendered (Docket No. 869), the district judge appointed Vincent Nathan, Esq. and Fritz Byers the Court Monitors.[5] The court ordered then to make a current

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[5]The Office Of The Court Monitor has filed reports on areas of constitutional concern other than overcrowding to match the district court's findings that constitutional violations are not limited to overcrowding. These reports include: Parole Procedures, May 11, 1987; Classification, August 4, 1987; Open Celling, January 25, 1988; Medical and Mental Health Plans, December 23, 1988, amended December 13, 1989; Security Plan, March 2, 1989; Mixing

assessment of the state of compliance with the September 5, 1980 order, to report on conditions disclosed by the evidence, and to propose remedial plans designed to bring the conditions to a level of constitutionally acceptable standards. There was no appeal from that order, either.

By agreement of the parties and the Court Monitor, the starting point in raising conditions of confinement to constitutional levels and the keystone for plans in all the areas where remedial action was needed (classification, health, sanitation, security) was population control.

After more than six months of intense negotiations, the petitioners and respondents reached an agreement that was filed on September 10, 1986. That was more than six years after the district court's original order and findings. As a quid pro quo for the agreement, respondents withdrew their motions seeking contempt penalties against the respondents and other defendants. After notice to the class and following a hearing on January 26, 1987, the district court issued an order approving the Stipulation filed by the parties and directing the petitioners to implement the Stipulation. (Docket No. 948).

The Stipulation fixes the maximum population for the different institutions at the 35 and 55-square-foot per inmate

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Youths and Adults, May 18, 1989; Environmental Health Plan, July 17, 1989; Security and Life Safety Issues, January 19, 1990 and Staffing, February 15, 1990.

levels. The time-table agreed upon in this Stipulation was:

> a. As of November 30, 1986, the State Penitentiary, including the Intensive Treatment Unit, was to house no more than 1151 inmates in cells. The inmates at the Intensive Treatment Unit could not be confined more than one to a cell. The rest of the State Penitentiary could be converted into "open ceiling" with double cell occupancy, provided that these inmates who were doubled celled were pre-trial detainees and, provided further, that certain conditions were maintained as to their care and custody.
>
> b. As of December 31, 1986, the Administration of Corrections was to provide 35 square feet of personal sleeping and living space to each inmate, and each institution was given a rated capacity.
>
> c. As of December 31, 1987, the Administration of Correction was to provide 55 square feet of sleeping and living space to each prisoner.

Non-compliance with the Stipulation followed almost immediately upon its approval by the court. As soon as the Court Monitors reported the violations, respondents moved for a finding of civil contempt and the imposition of sanctions against petitioners. Respondents requested the court to order petitioners to pay $200.00 per prisoner, per day, for each prisoner that was being kept under conditions which violated the Stipulation (Docket No. 962). A hearing was held on the matter on May 27, 1987. Morales Feliciano v. Hernández Colón, 697 F.Supp. 26 (D.P.R. 1987). System-wide overcrowding in violation of the stipulated and ordered limits was found. Id. at 31-33. Then, just as now, petitioners claimed "an unforeseen population increase." Id. at 33. The court

rejected the plea, and carefully explained. Id. at 35-36. The court fine petitioners $50,000.00 and a prospective daily fine of $10.00 per inmate held in excess of stipulated capacities. Id. at 36.

> Significantly, the trial court found:
>
> 1. ...
>
> 2. The constitutional rights of respondent class guaranteed to them by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States have been violated and continue to be violated as a consequence of non-compliance with the terms of the stipulation of September, 1986.

Id. at 33 (emphasis added).

Petitioners did not appeal this critical, July 23, 1987 finding. Now, two-and-a-half years later, in their first "question presented" to this Court, they question whether their unabated failure to comply with the 1986 stipulation "by itself" supports a ruling they attribute to the Court of Appeals that such failure indeed violates the Eighth Amendment. In mid-1987, the trial court found that such failure does violate the Amendment, and petitioners never appealed that finding. Petitioners are, therefore, directly trying to appeal to this Court a trial court's findings and conclusion which petitioners have steadfastly failed to appeal to the Court of Appeals, the proper forum.

Not only have petitioners never appealed from the July 23, 1987 finding of contempt and imposition of fines, but they also

never have appealed from the September 25, 1987 Order. At that time the district court issued another Order specifically directed to the State Penitentiary after it was called to the court's attention that the holding pens at that institution, which had a rated capacity of twelve (12) prisoners per cell and which were devoid of sanitary facilities of any kind and contained no beds, were found to be housing as many as fifty (50) prisoners to a cell during the months of July, August and September, 1987. Based on these conditions, which were personally viewed by the trial judge on July 20, 1987 and documented by the Court Monitors' reports, the court turned down respondents' request to order these cells closed, but increased the monetary sanctions for exceeding the population capacity limits in these holding pens only, from $10.00 per prisoner to $50.00 per prisoner. The court also warned the petitioners that, in the event of future non-compliance, the sanctions would be imposed for each and every prisoner housed in the over-populated holding pens, and that if this increased sanction proved to be insufficient, additional sanctions would be considered including that of closing these cells (Docket No. 1084).

Instead of appealing the contempt findings, petitioners unsuccessfully tried to extricate themselves from their own stipulation by seeking relief from judgment under Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure. Morales Feliciano v. Hernández Colón, Pet. Appendix C. In that motion, petitioners made most of the arguments they now make to this Court, particularly

about changing circumstances, Ibid 36a-40a. The trial court rejected those arguments, and petitioners, once again, failed to appeal from the denial of their motion for Rule 60(b) relief.

In April 1988, the trial court, portrayed by petitioners as unreasonable and insensitive to the often-repeated "unanticipated constructions delays caused by bad weather" (Pet. pp. 6, 7, 9 and 23), gave petitioners a full year's relief from that part of the September 1986 Stipulation which required the provision of 55 feet of living space after December 31, 1987 because the trial court took into account "weather-related construction delays." Morales Feliciano v. Parole Bd. of Com. of P.R., 887 F.2d 1, 3. (1st Cir. 1989). Petitioners are obfuscating when they suggest to this Court that during early 1988 they were in substantial compliance with the 35 square feet standard (Petition at 6), when under the terms of the Stipulation, as of December 31, 1987 the Administration of Corrections was supposed to provide each prisoner 55 square feet of living and sleeping space.[6]

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[6]Population levels in Commonwealth prisons were supposed to meet the 55-square-foot standard on January 1, 1989, after the one year extension of the stipulated date granted petitioners by the district court. Yet the numbers reported by petitioners to the Office of the Court Monitor show that as of November 1, 1989, a substantial number of inmates amounting to 21.93% of the total population were not being afforded the stipulated and delayed space. Respondents' numerous motions to hold petitioners in contempt have not been acted upon by the district court which is obviously once again giving the petitioners more flexibility to obey than they have a right to.

After September 25, 1987, thirty (30) assessments were made by the court based upon reports of non-compliance filed by the Court Monitors. No appeal was ever taken from any of the Orders levying fines until the issuance of the August 15, 1988 Order (Docket No. 1343) which raised the daily fines to $50.00 per inmate in excess of stipulated capacity, and an increase by $10.00 per inmate on the first day of each succeeding month until compliance is finally achieved. Review of only this Order is now sought by the petitioners. Petitioners have not requested a stay of the contempt sanctions. At all times, the petitioners could have purged themselves of contempt by compliance.

This, and only this August 1988, Order was appealed by petitioners to the Court of Appeals for the First Circuit. The underlying orders, factual findings and legal conclusions were never raised in the Court of Appeals, and no appeal based on these issues was ever made. Indeed, since petitioners have paid all fines imposed by the trial court, they cannot claim any recoupment. United States v. Mississippi Tax Commission, 412 U.S. 363 at 368 n.10 (1973). There is no fact to support a compelling issue or a conflict between the opinions below and the opinions of any other Court of Appeals or of this Court.

SUMMARY OF THE ARGUMENT

The issues presented for review cannot be reviewed on this record: the only issue properly before the Court is whether

the district court abused its discretion in raising fines for contempt. Even the order finding petitioners in contempt was never appealed by petitioners. A semblance of adequacy in the presentation of the issues can be achieved by petitioners only by misstating the course and character of the proceedings in this case. The decisions underlying the finding of contempt cannot be raised now on an appeal from an order raising fines. The Eighth Amendment issues in this case were correctly decided by the district court under the standards set by this Court. The Court of Appeals found the same facts as the district court and this Court will not review such factual findings under settled principles of review. The decision of the Court of Appeals is not in conflict with decisions in other circuits since well settled legal principles were applied to the very particulars facts of this case. The district court acted within its discretion in raising fines to efficiently punish contempt and the Court of Appeals properly applied in review an abuse of discretion standard.

The Court lacks jurisdictions to issue the writ because the petition for certiorari was not timely filed.

ARGUMENT

PETITIONERS CANNOT NOW COLLATERALLY ATTACK THE UNDERLYING ORDERS REQUIRING 35 SQUARE FEET OF SPACE PER INMATE

This eleven-year-old class action seeks relief from the pervasive, unconstitutional conditions of confinement in the

Commonwealth of Puerto Rico's prisons.[7] Certiorari can be sought by petitioners only on the order entered by the United States District Court for the District of Puerto Rico which increased fines imposed as a sanction for petitioners' repeated failure to comply with a Stipulation and Order to provide sufficient living space for the inmates. The petition does not involve the order finding the petitioners in contempt and imposing the basic sanction. There was never an appeal from that order. The petition does not involve the validity of the order establishing population caps at either a 55-square-foot standard, or the earlier 35-square-foot standard. Those were negotiated standards agreed to by the petitioners, and no appeal was ever taken from the order entered on the Stipulation agreed to by the parties and approved by the district court. The petition does not involve the appointment of a court monitor. That order was not appealed. The petition does not involve the 1986 findings made by the district court of pervasive violations of the inmates' federally protected constitutional rights by the petitioners, Morales Feliciano v.

7The shocking conditions of Puerto Rico's prisons were first noted in case reports fourteen years ago, when U.S. District Judge Juan R. Torruella, referring to "La Princesa", the San Juan District Jail, found it "difficult to hear this case without mounting indignation and an overpowering sadness." That jail, he found to be a "[...]notorious monument to man's inhumanity to man. Immediate and permanent closure of this institution would be the only appropriate and efficacious relief which this Court could grant under existing conditions[...]" Martínez Rodríguez v. Jiménez, 409 F.Supp. 582, 595 (D.P.R. 1976), affirmed on refusal to stay 537 F.2d 1 (1st Cir. 1976).

Hernández Colón, 672 F.Supp. 591 (D.P.R. 1986). That order was never appealed. This petition does not involve the original findings of pervasive unconstitutionality, Feliciano v. Barceló, 497 F.Supp. 14 (D.P.R. 1979). That, too, was never appealed.

It is a canard to state, as petitioners do at page 2 of the Petition, that the issue of Eighth Amendment violations concerning overcrowding and other conditions of confinement are still pending determination. On several occasions, the district court has held that petitioners have violated the Fifth, Eighth and Fourteenth Amendment rights of convicted and pretrial inmates. Specifically, overcrowding was condemned as unconstitutional in both Morales Feliciano v. Hernández Colón, 672 F.Supp. 591 (D.P.R. 1986) and in Feliciano v. Barceló, 497 F.Supp. 14 (D.P.R. 1980). Moreover, overcrowding has never been addressed in isolation by the district court but as one of many factors contributing to the infliction of cruel and unusual punishment.

Petitioners' first argument is that the requirement of 35 square feet of space per inmate is beyond the minimum standards required by the Eighth Amendment. This requirement originated with the District Court in September, 1980 when it ordered the Commonwealth to provide additional capacity to meet this requirement. In September of 1986, the parties entered into a stipulation that the Commonwealth would meet the 35-square-foot requirement by the end of 1986. In January, 1987, the Court approved the stipulation and ordered the Commonwealth to comply

with its terms.

Petitioners argue that they did not violate the Eighth Amendment by failing to comply with the Stipulation[8] because the crowded conditions that exist at the Puerto Rican prisons do not constitute cruel and unusual punishment as defined by this Court in Rhodes v. Chapman, 452 U.S. 337 (1981) and Bell v. Wolfish, 441 U.S. 520 (1979).

But, even if petitioner were right in this claim, it is too late for this Court to review the constitutionality of the 35-square-foot standard. That issue should have been appealed in September, 1980 when the District Court established the standard and issued a preliminary injunction ordering that the standard be met. Petitioners also might have raised and appealed that issue in January, 1987 when the District Court approved the Stipulation and reiterated the decision made in its preliminary injunction to order compliance with its terms. Since petitioners chose not to appeal those orders, however, they are final and constitute the law of the case. Inmates of Suffolk County Jail v. Kearny, 573 F.2d 98 (1st Cir. 1978).

The only issue that can be presented to this Court is whether the district court acted within its discretion in increasing the fines levied against the Commonwealth for continued

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[8]Petitioners fail to mention that they were found in non-compliance of two court orders, that of September, 1980 which set the original space requirements and that of January 1987 which ordered compliance with the stipulation.

contempt of the Court's orders of September 1980 and January 1987. The petitioners cannot now attack the underlying orders. This court long ago fixed the boundaries for review of contempt proceedings:

> It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.

Maggio v. Zeitz, 333 U.S. 56, 69 (1948). See also Local 28 of the Sheet Metal Workers' International Association v. E.E.O.C., 478 U.S. 421 (1986) and United States v. Rylander, 460 U.S. 752, 756-57 (1983) (both reaffirming the principle enunciated in Maggio).

Thus the scope of review on appeal is limited to inquiring whether the order of August 1988, which increased the amount of the contempt fines, was entered properly. See Cabrera v. Municipality of Bayamón, 622 F.2d 4, 7 (1st Cir. 1987) ("an order of civil contempt entered after final judgment is appealable but the scope of our review is limited to inquiring whether the contempt order itself was properly entered.")

In Walker v. City of Birmingham, 388 U.S. 307 (1967), the district court had issued a temporary injunctive order which prohibited civil rights protestors from participating in mass processions without a city permit. The protestors did not challenge the order through established court procedure and marched

in violation of its terms. When contempt proceedings were brought, they attempted to attack the constitutionality of the order at that time. This Court ruled that since the protestors had failed to take advantage of their opportunity to challenge directly the validity of the order, they were precluded from doing so in the collateral contempt proceeding.

Federal courts called upon to enforce court orders in prison overcrowding cases have recently found that the collateral bar principle applies with special force when the underlying judgment is by stipulation or consent. In Twelve John Does v. District of Columbia, 855 F.2d 874 (D.C. Cir. 1988), for example, the District of Columbia attempted to evade responsibility for violating the terms of a consent decree on the ground that the conditions of the facility complied with constitutional standards. The Circuit Court rejected this argument:

> The District's argument that conditions at Central do not implicate the Eighth Amendment is of no avail. The District voluntarily agreed to the terms of the consent decree in lieu of litigating the constitutional issues raised by appellees' complaint. The requirements of the decree, not the Eighth Amendment, were the measures of the District's responsibilities. The District cannot unilaterally alter the terms of the decree in its endeavor to erect a defense to the contempt motion.

855 F.2d at 878, n.30. In Badgley v. Varelas, 729 F.2d 894, 899 (2nd Cir. 1984) the Second Circuit stated that whether or not the conditions at the prison violated the Constitution, the only issue before the district court was whether they violated the consent

decree. In Palmigiano v. DiPrete, 700 F.Supp. 1180, 1194-95 (D.R.I. 1988), the district court rejected an argument by the Rhode Island Department of Corrections and other defendants that they should not be held in contempt of an order to reduce overcrowding because they had succeeded in bringing present conditions into compliance with constitutional requirements; the district court could consider only whether its standing orders would be enforced by holding defendants in contempt. Also, in Ruiq v. McCotter, 661 F.Supp. 112, 116 (S.D. Tex. 1986), a civil contempt proceeding arising from defendants' non-compliance with several previous orders in a prison reform action, the district court concluded that "questions concerning the constitutionality of the Texas prison system are not under consideration at the present juncture; rather, the matters in dispute relate to allegations of contumacy by TDC with respect to specific provisions of prior orders."

The policies that underpin the application of special force to the collateral bar principle are implicated in this case. The Commonwealth entered into the underlying court-approved stipulation voluntarily and after careful deliberation in order to avoid litigation on contempt motions which plaintiffs withdrew as consideration for the stipulation.

Petitioners apparently understand the collateral bar principle, for they do not directly challenge the underlying orders of September 1980 and January 1987. Rather, they assert that the First Circuit's affirmance of the order of the district court

imposing additional civil contempt fines was based on the court's "assumption" that their failure to comply with the 35-square-foot requirement violated the Eighth Amendment. Petitioners then use this unfounded assertion as a springboard for their attack on the underlying orders.

The Court of Appeals made no express finding or hidden assumption about the constitutionality of the 35-square-foot space requirement imposed by the District Court in 1980. Rather, the Court of Appeals properly considered the prisoner's Eighth Amendment interests to determine whether the Commonwealth's asserted compliance was "substantial" as required for a defense to contempt. The so-called "assumption" of Eighth Amendment violation is really a thinly veiled device to make a collateral attack on the merits of the underlying, unappealed orders, and petitioners are foreclosed from making this attack.

The Court of Appeals in so many words stated that the merits of the case were not considered in its decision:

> [...] any dispute on the merits (either of the constitutional violation or the remedial need to provide more than 35 square feet per prisoner) ended long ago. The district court entered an injunction embodying the "35 square foot" requirement 9 years ago; the Commonwealth stipulated that it would quickly satisfy this requirement more than 2 years ago; there is no reason now to think the Commonwealth will further litigate the merits. Moreover, the issues raised here concern neither the merits of the underlying constitutional questions nor the legal validity of the "35 foot" requirement. Rather, they concern only compliance.

Morales Feliciano v. Parole Board Of The Commonwealth of Puerto Rico, Pet. Appendix, 62-72.

NO CONFLICT EXISTS WITH DECISIONS OF THIS COURT OR AMONG THE CIRCUITS

The district court in fact correctly applied the Eighth and Fifth Amendment standards set by this Court in Rhodes v. Chapman, 452 U.S. 559 (1981) and Bell v. Wolfish, 441 U.S. 520 (1979). The district court has never come close to holding that overcrowding is by itself a constitutional violation. Even a cursory reading of the district court's opinion--which the petitioners carefully failed to print in their Appendix--shows that the district court held overcrowding to be the infliction of cruel and unusual punishment because of its intensity and because it occurs in dilapidated, unsanitary institutions and causes pervasive breaches in security and in delivery of health services to inmates.

This case is also not appropriate to decide an alleged conflict among circuits on the perceived strict/flexible standards of reviewing contempt decisions. The Court of Appeals found, as the district court had found, that "[w]e cannot say that compliance is so 'substantial' as to invalidate the finding of contempt." Pet. Appendix, 8a. The Court of Appeals also affirmed that "good faith" efforts could not save the petitioners from contempt in this case because

> In sum, we believe the district court could find that it was within the Commonwealth's power to comply with its own "35 square foot" timetable. That being so, and given the extent to which the prison system remained out of compliance, we believe the district court could find, in August 1988, that the Commonwealth had failed to meet the court's (and its own) time schedule; that it remained in contempt; and that further monetary sanctions were appropriate.

Pet. Appendix 102.

These factual questions were "[...] resolved against petitioners by both courts below, and therefore barred from review in this Court 'absent the most exceptional circumstances.'" Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 299 (1985), citing Branti v. Finkel, 445 U.S. 507, 512 n.6, ("[...] our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred [...]").

There are no extraordinary circumstances in this case to justify a departure from settled practice. The issue here is not one of flexible/strict application of a Stipulation and order. The petitioner quite simply faced a sanction after long contumacy which finally stings: disobedience is no longer cheap.

With more bravado than wit the petitioners point out that the district court has not found them in contempt for violations of orders in other areas. Pet. 9. The petitioners fail to state that they have avoided contempt proceedings in other areas by entering into negotiations which have resulted in the reports and

plans filed by the Court Monitor. Ante footnote 5. Whether petitioners will again fail to abide by their agreements and disobey court orders, and what will then happen, is not at present relevant. However, need continues for judicial remedies to substantial constitutional violations. The alternative is anarchy.

THE SANCTIONS IMPOSED ON PETITIONERS ARE WITHIN THE DISTRICT COURT'S DISCRETIONARY AUTHORITY

Defendants do not challenge the district court's inherent power to enforce the Stipulation and its order, nor do they contest the district court's discretionary power to fashion a remedy to bring about compliance.[9] What defendants are challenging is the exercise of that discretion in deciding upon a particular remedy. Petitioners do not and cannot argue that there has been non-compliance both prior to and after the crowding Stipulation and the court's order finding the defendants in contempt. The particular order being appealed from is that of increasing the fines although collaterally defendants are trying to go back to the July 23, 1987

9The district courts have authority to enforce their lawful orders through civil contempt, Shillitani v. United States, 384 U.S. 364, 370 (1966), and the ability to punish disobedience to judicial orders is essential in ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches of government. Young v. U.S. Ex Rel Vuitton Et Fils S.A., 481 U.S. 787, (1987). Mr. Justice Lamar wrote 80 years ago: "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." Gompers v. Bocks Stove & R. Co., 221 U.S. 418, 449 (1910)

order and challenge the finding of contempt. As to the latter, we reiterate our position that the August 15, 1988 Order is not a second finding of contempt and that the July 23, 1987 Order was not appealed from and could not be appealed as an interlocutory appeal. The Court of Appeals in this case correctly applied the well-established standard by which the August 15, 1988 Order is to be reviewed: "a clear showing of abuse of discretion." Perfect Fit Industry v. Acme Quilting Co., 673 F.2d 53 (2nd Cir. 1982), cert. den. 459 U.S. 837.

Applying these factors to Chief Judge Pérez Gimenez's Order of August 15, 1988, the record amply supports the increase in fines. In the eighteen months prior to the Order, defendants had never once complied with the triple and quadruple bunking in violation of the Stipulation. The inmates, particularly the detainees and young adults, were sleeping on the floor, and the situation got to the point that because of lack of water and literally the collapse of the facility, the Court had to order the immediate reduction of its population and its closing down by December 31, 1988. Pre-trial detainees are still being housed together with sentenced inmates at State Penitentiary, Aguadilla, Guayama and Women's Prison in Vega Alta in violation of the Stipulation. The population has grown by 21 per cent, a rate predicted by plaintiffs' counsel and the court monitors at the time the Stipulation was being discussed even though defendants, hoping against hope, argued that such a rate of growth was not predicted

by their consultants (Docket Entry No. 977).

The lives and well-being of thousands of prisoners are being threatened and continue to be threatened by the severe overcrowding which is compounded by the existence of rival prisoner gangs which had been controlling the institutions for years and which dictate the terms of a prisoner's existence and placement within a given institution. Defendants argument of good faith, and diligence becomes meaningless when placed under the harsh light of gang control. It is not the Administration of Corrections but gangs who decide where a confinee can live, and which of the prisoner necessities of life are available to her or him. Classification is meaningless and is reduced to gang affiliation: Inmates with a minimum custody classification and who can obtain good-time credits for work or study programs are kept in isolation or in a restricted confinement simply because they are living in the wrong institution in terms of gang affiliation.

THE COURT IS WITHOUT JURISDICTION TO GRANT A WRIT OF CERTIORARI BECAUSE THE PETITION WAS NOT TIMELY FILED

In civil cases, this Court's jurisdiction to entertain petitions for certiorari is limited to those cases where the petition is timely filed. The failure to timely file a petition

for certiorari constitutes an unwaivable jurisdictional defect.[10]

In this case, former Rule 20.2 and 28 U.S.C. 2101(c) provided a ninety-day period after the entry of the judgment or decree to petition for certiorari. See also present Rule 13.1.

The judgment of the Court of Appeals was entered on September 26, 1989. Pet. at 2; Morales-Feliciano v. Parole Bd. of Com. of P.R., 887 F.2d 1 (1st Cir. 1989). Therefore, pursuant to former Rule 29.1 (now Rule 30.1) the last day to petition for certiorari was December 26, 1989. (No extension of time was applied for under former Rule 20.4, and no motion for a rehearing was filed in the Court of Appeals.)

Rule 20.2 provided that a petition for writ of certiorari would be "deemed in time if filed with the clerk within the time prescribed by law." See also present Rule 13.1. Rule 28.2 defined timely filing: receipt by the Clerk within the time specified for filing. See also present Rule 29.2 (actual receipt within the time specified for filing).

Respondents contend that the petition was not filed with the Clerk, i.e., actually received by him, on December 26, 1989.

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[10]Department of Banking v. Pink, 317 U.S. 264 at 268, 87 L.Ed. 254 at 257 (1942); Matton Steamboat Co. v. Murphy, 319 U.S. 412 at 415, 87 L.Ed. 1483 at 1485 (1943); Citizens' Bank of Michigan City v. Opperman, 249 U.S. 448 at 451, 63 L.Ed. 701 at 702 (1919). See also Teague v. Commissioner of Customs, 394 U.S. 977, 22 L.Ed 2d 756, reh. den. 395 U.S. 930, 23 L.Ed. 2d 251 (1969); and Deal v. Cincinnati Board of Education, 402 U.S. 962, 29 L.Ed. 2d 128 (1971).

It was filed next day, December 27, 1989, and thus was out of time.

As the Court may readily notice, the petition was machine-stamped as "filed" on December 27, 1989; but the number "26," back-dating the machine stamp, was handwritten or penned over the number "27." The facts surrounding this alteration of the machine stamp, as far as respondents have been able to ascertain, were as follows.

On December 26, 1989, there was no Order of this Court or of the Chief Justice closing the Court building. However, the petition was allegedly filed by leaving it with a Supreme Court policeman. Respondents have been informed that the reason for this informal "filing" was that some of the docketing staff may have been excused from duty that day. Apparently following prior practice,[11] the policeman took the package and delivered it to the Clerk's office the following morning, December 27, 1989.

As in Pavelic & Leflore v. Marvel Entertainment Group, 58 U.S.L.W. 4038 (1989), the rules of the Court must be given their plain meaning.[12] Supreme Court policemen may be "overseen" by this

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[11]Stern, Gressman & Shapiro, Supreme Court Practice, Sixth Edition, p.305 (1986). This practice is considered "standard operating procedure" by the Clerk's office. See Exhibit "E" hereto.

[12]See also Northbrook National Insurance Company v. Brewer, 493 U.S. 107 L.Ed. 2d 223 (1989) (giving 28 U.S.C. 1332(c) its plain meaning); and Hallstrom v. Tillamook County, 493 U.S. , 107 L.Ed. 2d 237 (1989) (same as to 42 U.S.C. 6972).

Court's Marshal, but they are not the Marshal or part of his office. 28 U.S.C.A. 672(c)(8). More importantly, the Supreme Court Police has no statutory authority to perform the duties of, or act for, the Clerk of this Court. 40 U.S.C.A. 13 n.(a). Therefore, receipt by the policeman was not receipt by the Clerk.

The result demanded by respondents, dismissal of the untimely petition for want of jurisdiction, is not unduly harsh. First of all, since the defect is jurisdictional, and unwaivable, a delay of even one day is nevertheless fatal. Deal, supra. In this regard it should be noted that, a matter of course, this Court routinely denies any and all motions to direct the Clerk to file petitions for writs of certiorari, out of time.[13]

"[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980).

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[13]Posey v. Department of the Air Force, 58 U.S.L.W. 3212 (Oct. 2, 1989); Yang v. McCarthy, 58 U.S.L.W. 3212 (Oct. 2, 1989); National Railroad Passenger Corp. v. Transportation Communication Union, 58 U.S.L.W. 3239 (Oct. 10, 1989); Miller v. Farmers Alliance Mutual Insurance Company, 58 U.S.L.W. 3288 (Oct. 30, 1989); Ramachandran v. Secretary of the Navy, 58 U.S.L.W. 3304 (Oct. 30, 1989); Stocks v. U.S., 58 U.S.L.W. 3304 (Oct. 30, 1989); Firey v. Washington, 58 U.S.L.W. 3320 (Nov. 13, 1989); Humphrey v. Bates, 58 U.S.L.W. 3384, 107 L.Ed. 2d 552 (Dec. 11, 1989); Fleming v. District Court for the County of El Paso, Colorado, 58 U.S.L.W. 3426 (Jan. 8, 1990); Slater v. Goldberg, 58 U.S.L.W. 3426 (Jan. 8, 1990); Ewing v. Maples, 58 U.S.L.W. 3426 (Jan. 8, 1990); Fazzini v. Gluch, 58 U.S.L.W. 3426 (Jan. 8, 1990); Filling v. Cunningham, 58 U.S.L.W. 3467 (Jan. 22, 1990); Mitchelson v. Kemmerer Coal Company, 58 U.S.L.W. 3467 (Jan. 22, 1990).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied, as respondents hereby very respectfully demand.

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